STATE OF MICHIGAN

COURT OF APPEALS

ROSALIND COHEN,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
June 21, 2007

No. 268239
Wayne Circuit Court
LC No. 03-337702-NZ

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition to defendant regarding plaintiff's race and gender discrimination and retaliatory discharge from employment claims. Because plaintiff has not shown that discrimination was a motivating factor for defendant's adverse employment actions, we affirm.

Plaintiff is a physician who defendant hired in 1992 as a plant medical director. According to plaintiff, within a few years, she was being discriminated against based upon her race (Caucasian) and gender in terms of her compensation, promotions, and resources and support. Plaintiff raised issues concerning discriminatory treatment with defendant for several years and, in 2002 filed a complaint against defendant with the Michigan Department of Civil Rights (MDCR). Defendant fired plaintiff on December 3, 2002. In November, 2003, plaintiff filed suit against defendant, alleging discrimination and retaliatory discharge. Defendant filed a motion in 2005 for summary disposition based upon MCR 2.116(C)(7) and (10), to which plaintiff responded and filed her own partial motion for summary disposition. The trial court granted defendant's motion and denied plaintiff's motion for partial summary disposition. This appeal followed.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant because defendant's articulated reasons for terminating her were merely pretexts for discrimination and were in retaliation for her filing complaints of gender and race discrimination. We disagree.

A motion for summary disposition made under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

There is a genuine issue of material fact when reasonable minds could differ upon an issue after viewing the record in the light most favorable to the nonmoving party. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court must limit its review to the evidence presented up to the time defendant's motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

The Civil Rights Act (CRA), MCL 37.2101 *et seq.*, prohibits an employer from discriminating against an individual "with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a); *Hazle v Ford Motor Co*, 464 Mich 456, 461-462; 628 NW2d 515 (2001). "Proof of discriminatory treatment in violation of the CRA may be established by direct evidence or by indirect or circumstantial evidence." *Sniecinski v Blue Cross And Blue Shield Of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence demonstrates that unlawful discrimination was a motivating factor in the employer's action. *Hazle*, *supra*, p 462.

If there is no direct evidence, the plaintiff must proceed using the *McDonnell Douglas*[1] burden-shifting approach. *Hazle*, *supra*, p 462. First, the plaintiff must establish a prima facie case of discrimination by presenting evidence that she was: "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Once plaintiff shows the prima facie case, the defendant then has the burden to show a legitimate, nondiscriminatory reason for the adverse employment action to rebut the presumption of discrimination. *Sniecinski*, *supra*, p 134. If the defendant meets that burden, it shifts back to the plaintiff to show that such reasons were merely a pretext for discrimination. *Id*. To survive summary disposition, the plaintiff must show that discrimination was a motivating factor for the employer's adverse action. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998).

Here, plaintiff has offered no direct evidence that her race or gender were motivating factors in her compensation, promotion opportunities, or termination. Application of the *McDonnell Douglas* burden-shifting approach is thus appropriate. Notably, a well-pleaded

---

[1] *McDonnell Douglas Corp v Green*, 411 US 792, 802-804; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

complaint is sufficient to establish a prima facie case of discrimination. *Lytle*, *supra*, p 173. Plaintiff's complaint alleged gender discrimination, race discrimination, and retaliation, asserting that she was a Caucasian female, she performed her job duties in a manner that was satisfactory or better, and she was treated less favorably than her male and African-American counterparts with respect to compensation, promotional opportunities, and termination of her employment. Thus, plaintiff presented a prima facie case of discrimination.

In its motion for summary disposition and termination letter, defendant enumerated that the legitimate, nondiscriminatory reasons for plaintiff's discharge were her insubordination for refusing to report to a different supervisor, treatment of her son at the clinic while on disability leave, and taking prescription medication for her son's personal use without recording the incident or removal of the drug. Therefore, the burden is on plaintiff to show that these reasons were a pretext for discrimination. *Sniecinski*, *supra*, p 134.

To show that either race or gender discrimination was a motivating factor in plaintiff's treatment, she must demonstrate that she was treated differently from similarly situated employees. *Lytle*, *supra*, p 178. Two employees are similarly situated if all the relevant aspects of their employment situation are nearly identical. *Town*, *supra*, p 699-700. Plaintiff argues that the trial court erred in concluding that the physicians she identified were not similarly situated because they had several more years of service and had different starting salaries. Plaintiff appears to allege that, based on defendant's system, market rate should be the only relevant aspect considered. However, the factors that determine a physician's base salary were identified as market rate *and* length of service and contribution. Therefore, plaintiff's argument fails.

Plaintiff's salary increases each year were: 6.59 percent in 1993; 15.17 percent in 1994; 10.56 percent in 1995; 4.07 percent in 1996; 4.3 percent in 1997; 3.97 percent in 1998; 4.12 percent in 1999; 5 percent in 2000; 5.03 percent in 2001; and 2 percent in 2002. Plaintiff made several formal and informal complaints regarding her compensation from 1996 to the time of her termination. Some time during the summer of 2002, Dr. Joel Bender, corporate medical director, made an inquiry to human resources to see where plaintiff's compensation fell within the range of her peers, and human resources advised that plaintiff was well within the range of others.

While plaintiff contends that her low pay increases were based upon discrimination, it appears from the evidence that the lower percentages directly correlate to plaintiff's performance problems. The evidence demonstrates that on April 26, 1996, after having conversations with Dr. Thomas H. Morley, plaintiff's supervisor, and Dennis Siler, head of the union for medical personnel, Dr. Douglas VanBrocklin, director of health and safety, met with plaintiff to discuss various concerns about her performance. Specifically, plaintiff had been dishonest on several occasions to Stiler, was unavailable for meetings, was often not at work, wore the same clothes three days in a row that were wrinkled and stained, had mood swings, had difficulty with her nursing staff, and made no attempt to work jointly with the union.

On June 11, 1996, and July 26, 1996 Dr. Morley documented discussions with plaintiff regarding, among other things, her inconsistent communication (is cordial one day and threatening the next; is stubborn and argumentative; creates an accusatory, uncomfortable and threatening environment; is manipulative, deceitful and untrustworthy), ability to work with others, the circumstances that prevented her from being at work consistently, and her sporadic and unpredictable participation in disability management. In November 1996, plaintiff was

moved to the Service and Parts Operations (SPO) facility in Flint, and she retained her title of medical director and level of 9P21 even though the position she was moving to was classified as a 9P10 at that time. Plaintiff no longer had supervisory responsibilities over physicians, no longer had a personal secretary, had to attend leadership meetings, and was required to see patients every day.

The evidence also demonstrates that when Dr. Bender became corporate medical director in April or May 2002, he received numerous memos concerning plaintiff regarding her performance and hygiene issues. Dr. Bender indicated to plaintiff that he wanted plaintiff to work on her leadership skills regarding broadcast emails and conference call discussions. When plaintiff complained about her reporting relationship to Lorraine Carnes, director of operations, Dr. Bender changed the reporting relationship from Carnes to himself. Bender met with plaintiff several times during July, August, and September of 2002 to address specific issues with her performance, including issues with ergonomics management within the division, plaintiff's tendency to blame others for lack of problem resolution, plaintiff's poor personal hygiene, and the fact that plaintiff did not visit the other plants within the division on a regular basis.

On October 2, 2002, plaintiff had a meeting with Charlie Hyndman, Dr. Bender and Joanna Schuler, director of human resources for SPO, at which Hyndman told plaintiff that they wanted to have her report in to Dr. Stewart, a group health services director. Schuler explained to plaintiff that Hyndman's needs were not being met and that plaintiff had performance issues. Plaintiff responded that reporting to Dr. Stewart would not work for her. At the time, plaintiff was the only physician at the 9P21 level reporting directly to Dr. Bender rather than a group health services director. Dr. Bender testified at deposition that plaintiff's performance issues were significant enough that he could not devote enough time to them, and Dr. Stewart could provide more direct supervision. Dr. Bender tried to convince plaintiff to accept the circumstances and work through her performance issues, but plaintiff said she could not work under those circumstances. Kevin Smith, the head of human resources for the health care operation, and Dr. Bender called plaintiff the following day, warning her that her refusal to report to Dr. Stewart would be considered insubordination, for which she could be terminated. Plaintiff reiterated that she could not work under those circumstances.

Plaintiff went on medical leave, effective October 3, 2002, for acute stress response diagnosed by Dr. Luby. Plaintiff told Dr. Luby that she had refused to accept an assignment with an African-American physician who she felt was unqualified, and plaintiff was told that she would be terminated if she did not accept the assignment. Essentially, plaintiff was given several opportunities to correct her insubordination and consistently refused to report to Dr. Stewart. Plaintiff knew that such refusal would result in termination, and she was adamant that she would not change her mind, and was actually anticipating a severance package from defendant.

Plaintiff has not shown that she was treated differently than others whose relevant aspects of their employment situation were nearly identical to hers (i.e. similarly situated). Because she has not established that she was treated differently than other doctors of her pay scale, contribution level, and years of service who have refused to report to a group health services director, plaintiff has failed to demonstrate that the reasons for her compensation amount and ultimate termination were mere pretext for discrimination. *Sniecinski, supra*, p 134.

Regarding promotional opportunities, plaintiff claimed that she was wrongfully denied several promotions due to her race and/or gender (some of which plaintiff also acknowledges she was unaware were available). Specifically, plaintiff contends that although her position should have been made unclassified, meaning that it would become an executive position (and thus, a promotion), she was informed that there were not enough employees at SPO to make it an unclassified position. Plaintiff claims that there were less employees at Saturn, and the same position was unclassified and held by a Caucasian male, Dr. Stan Miller. Notably, however, Dr. Morley had recommended plaintiff for the promotional opportunity with the Saturn division, but plaintiff indicated that she was not interested, and only after that was the position filled by Dr. Miller.

Plaintiff also expressed that Dr. Wilson, the former corporate medical director, had told all the 9P21s that there would be no more unclassified positions, but after he left, Dr. Stewart was promoted to an unclassified position. Barre Morris, director of human resources, testified at deposition that Stewart received several strong recommendations for the promotion. Plaintiff has offered no evidence that she also received strong recommendations for promotions and was denied purely due to her race.

Plaintiff does not deny the other incident enumerated in her letter of dismissal regarding the treatment of her son at defendant's facility while she was on disability leave. On October 28, 2002, plaintiff's son was hit in the eye with a rubber band at work, which was three or four blocks from plaintiff's office. Plaintiff and her son's girlfriend picked him up and went to the SPO facility. Plaintiff called the medical department before they arrived, told the nurse, Sue Alexander, they would be there in a few minutes, and asked if they had any Opthane, a prescription ointment used to relieve pain in the eye. When they arrived, plaintiff put two drops of Opthane in her son's eye and examined him. She saw that he had a hemorrhage into the anterior chamber of his eye, so she took him to the emergency room. Plaintiff took the remainder of the bottle of Opthane with her, but did not record that she was doing so.

Plaintiff asserts that other physicians had acted in a similar manner without being terminated. However, plaintiff relates only incidents that she "heard" about, with no proof of the allegations. Plaintiff also asserts that she had administered vaccinations to executives and their family members who went on overseas assignments. For example, Dr. Bender's wife came in for immunizations when the company requested that she accompany him to the opening of a clinic in Latin America. However, this was an action for a company purpose, at defendant's request—not an action concerning a treatment of a non-employee family member undertaken at the employer's facility by a physician who was on disability leave. Again, then, plaintiff has failed to meet her burden in showing that the asserted reasons for her lack of promotions and ultimate termination were mere pretext.

Finally, plaintiff contends that the trial court erroneously granted summary disposition in defendant's favor with respect to her retaliatory discharge claim, as she presented evidence to show a causal connection between her firing and her filing complaints pursuant to defendant's open door policy and a Michigan Department of Civil Rights (MDCR) complaint. We disagree.

The CRA prohibits an employer from retaliating or discriminating against an employee for filing a complaint pursuant to the act. MCL 37.2701(a); *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 272-273; 696 NW2d 646 (2005). To establish a prima

facie case of retaliation, a plaintiff must show: (1) that she engaged in a protected activity; (2) the defendant knew of the protected activity; (3) the plaintiff was subject to an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997) (citations omitted).

To establish a causal connection between the protected activity and the employer's action, a plaintiff must demonstrate more than temporal proximity. *West, supra*, p 186. The protected activity must have been a significant factor in the employer's action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

Plaintiff's filing of the MDCR complaint is considered protected activity under the CRA. *Id*. However, Smith testified that he did not receive a copy of the complaint until a couple months after it was filed, and the letter from MDCR advising defendant that plaintiff had filed a formal complaint against it is dated February 10, 2003.

Even if Smith knew about the complaint, there is no evidence that defendant's termination was retaliatory. In addition to plaintiff's refusal to report to Dr. Stewart, plaintiff's visit to the premises on October 28, 2002, initiated the process leading to plaintiff's termination. Plaintiff filed her MDCR complaint on November 7, 2002. Smith attempted to schedule a meeting with plaintiff regarding her visit to the premises, but she told him that she would not be able to meet with him for at least a month. Plaintiff was discharged from employment on December 3, 2002.

Plaintiff also contends that defendant retaliated against her for filing complaints pursuant to defendant's open door policy because she was never informed of any performance issues prior to her 2002 meeting with Carnes. Plaintiff's open door complaints are not a part of the lower court record, so whether they are protected activity cannot be determined. Moreover, the record shows that plaintiff was informed of several performance issues in 1996, prior to filing any of her several open door complaints. The trial court thus did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette